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No. 73-1341

In the Supreme Court of the United States

OCTOBER TERM, 1973

DIVOSTA RENTALS, INC., PETITIONER

v.

EMMETT C. LEE, JR., COLONEL, CORPS OF ENGINEERS; HOWARD H. CALLAWAY, SECRETARY OF THE ARMY; AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. A14–A25) is not reported. The opinion of the court of appeals (Pet. App. A2–A13) and the denial of the petition for rehearing (Pet. App. A1) are reported at 488 F.2d 674.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1973. A timely petition for rehearing was denied on December 4, 1973 (Pet. App. A1).

538-718—74——1

The petition for a writ of certiorari was filed on March 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Army, upon the recommendation of the Chief of the Army Corps of Engineers, acted in an arbitrary and capricious manner by denying the petitioner's requested fill permit after receiving objections to its issuance from two agencies of the Department of the Interior, the Environmental Protection Agency, private citizens and the Palm Beach County Board of County Commissioners.

STATUTES INVOLVED

The relevant statutes involved are set forth as an appendix to this brief.

STATEMENT

On September 22, 1970, DiVosta Rentals, Inc., (DiVosta) applied to the Corps of Engineers for authorization to build bulkheads and to fill approximately 0.614 acre of Lake Worth, Florida (App. 7).[1] Although the original application did not specify the purpose of the bulkheading and fill operation, it was later disclosed that DiVosta planned to construct on the fill a multi-story reinforced concrete building (App. 80).

The Corps gave public notice of the request for a dredge and fill permit by DiVosta on October 22, 1970,

[1] "App." refers to the joint appendix filed in the court of appeals.

and received objections to the project from private citizens, the Palm Beach Board of County Commissioners (App. 67, 68, 69, 74, 75), the Bureau of Outdoor Recreation and the Bureau of Sport Fisheries and Wildlife of the United States Department of the Interior (App. 78–79), and the Environmental Protection Agency (App. 128). Two private citizens submitted letters supporting the grant of the proposed permit (App. 72, 73). The Environmental Protection Agency objected to the project because Lake Worth is a valuable estuarine area that has been subject to continual encroachment and abuse but is not beyond recovery, although further encroachment would make reclamation more difficult (App. 128). The Bureau of Sport Fisheries and Wildlife and the Bureau of Outdoor Recreation expressed similar objections (App. 125–126).

The Corps informed DiVosta of the objections and afforded it an opportunity to present arguments in support of the proposed project (App. 81). An attorney and an engineer representing DiVosta presented arguments and evidence to the District Office of the Corps (App. 83–106). This information was transmitted to the Department of the Interior and on March 4, 1971, the Corps was informed that the Bureau of Outdoor Recreation, the Bureau of Sport Fisheries and Wildlife and the Environmental Protection Agency remained opposed to the grant of the dredge and fill permit (App. 125–128).

On May 13, 1971, the Corps informed DiVosta of the unchanged opposition of the federal agencies and

asked whether DiVosta wished to pursue the application (App. 129). DiVosta informed the Corps that it did and requested further action (App. 130).

On February 2, 1972, the District Engineer recommended denial of the permit (App. 136–139). The Division Office of the Corps concurred (App. 140), and the permit was denied by the Secretary of the Army on March 29, 1972 (App. 141). On April 19, 1972, the District Engineer informed DiVosta that the application was denied, setting forth as reasons the objections of the Department of the Interior and the Environmental Protection Agency and the fact that the Board of Trustees of the Florida Internal Improvement Trust Fund approved this project only because of an order from a Florida circuit court (App. 20).

The petitioner then instituted this action for a mandatory injunction ordering the federal defendants to issue the requested permit. Two pretrial stipulations (App. 40–46, 153–158) delineated the evidence to be considered and stipulated that the case would be decided on that evidence and trial briefs. The district court found that the federal defendants' actions were not based upon factually substantial evidence and ordered issuance of the requested permit. On appeal, the court of appeals reversed. It held that the district court had erroneously utilized the substantial evidence test, rather than determining whether the federal defendants had acted in an arbitrary or capricious manner. Applying the latter standard, the court of appeals, upon its own review of the administrative record, held that the denial of petitioner's

application for a fill permit had not been arbitrary or capricious.

ARGUMENT

1. The court of appeals correctly held that the appropriate standard for review of a decision by the Secretary of the Army, upon the recommendation of the Chief of the Army Corps of Engineers, denying the issuance of a discretionary permit, is whether the Secretary's action was arbitrary or capricious. *United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352; *Greenleaf Lumber Co.* v. *Garrison*, 237 U.S. 251, 268; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414–417; *Camp* v. *Pitts*, 411 U.S. 138. See, also, *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Zabel* v. *Tabb*, 430 F. 2d 199 (C.A. 5), certiorari denied, 401 U.S. 910; *Bankers Life & Cas. Co.* v. *Village of No. Palm Beach, Fla.*, 469 F. 2d 994 (C.A. 5), certiorari denied, 411 U.S. 916.

2. Petitioner suggests that the court of appeals decision in *Zabel* v. *Tabb*, *supra*, changed existing law by allowing the denial of a fill permit even though the Secretary of the Army had found that the fill would not interfere with navigation. This Court, however, has consistently upheld the authority of the Secretary to deny dredge and fill permits on nonnavigational grounds. *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 101–102; *United States ex rel. Greathouse* v. *Dern*, *supra*; *Greenleaf Lumber Co.* v. *Garrison*, *supra*.

3. Petitioner's unsupported assertion that the opinions and conclusions of other federal, state and local

agencies do not constitute relevant and proper evidence to be considered by the Secretary of the Army and the Corps of Engineers is without merit. It would be anomalous indeed if the Secretary and the Corps, who are required under the provisions of the National Environmental Policy Act and the Fish and Wildlife Coordination Act to solicit views of federal, state and local agencies, were precluded from considering and relying on those views.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

STATUTES INVOLVED

Section 10 of the Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, 33 U.S.C. 403, provides:

> SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

The National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, provides:

PURPOSE

> SEC. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man

and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Coun-

cil on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the realtionship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany

the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

SEC. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality,

(2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

Section 2 of the Fish and Wildlife Coordination Act of 1934, as amended, 16 U.S.C. 662, provides as follows:

IMPOUNDING, DIVERTING, OR CONTROLLING OF WATERS—CONSULTATIONS BETWEEN AGENCIES

(a) Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development.

REPORTS AND RECOMMENDATIONS; CONSIDERATION

(b) In furtherance of such purposes, the reports and recommendations of the Secretary of

the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which sections 661–666c of this title apply. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits.

MODIFICATION OF PROJECTS; ACQUISITION OF LANDS

(c) Federal agencies authorized to construct or operate water-control projects are authorized to modify or add to the structures and operations of such projects, the construction of which has not been substantially completed on the date of enactment of the Fish and Wildlife Coordination Act, and to acquire lands in accordance with section 663 of this title, in order to accommodate the means and measures for such conservation of wildlife resources as an integral part of such projects: *Provided,* That for projects authorized by a specific Act of Congress before the date of enactment of the Fish and Wildlife Coordination Act (1) such modification or land acquisition shall be compatible with the purposes for which the project was authorized; (2) the cost of such modifications or land acquisition, as means and measures to prevent loss of and damage to wildlife resources to the extent justifiable, shall be an integral part of the cost of such projects; and (3) the cost of such modifications or land acquisition for the development or improvement of wildlife resources may be included to the extent justifiable, and an appropriate share of the cost of any project may be allocated for this purpose with a finding as to the part of such allocated cost, if any, to be reimbursed by non-Federal interests.

PROJECT COSTS

(d) The cost of planning for and the construction or installation and maintenance of such means and measures adopted to carry out the conservation purposes of this section shall constitute an integral part of the cost of such projects: *Provided,* That such cost attributable to the development and improvement of wildlife shall not extend beyond that necessary for

(1) land acquisition, (2) facilities as specifically recommended in water resource project reports, (3) modification of the project, and (4) modification of project operations, but shall not include the operation of wildlife facilities.

* * * * *

ESTIMATION OF WILDLIFE BENEFITS OR LOSSES

(f) In addition to other requirements, there shall be included in any report submitted to Congress supporting a recommendation for authorization of any new project for the control or use of water as described herein (including any new division of such project or new supplemental works on such project) and estimation of the wildlife benefits or losses to be derived therefrom including benefits to be derived from measures recommended specifically for the development and improvement of wildlife resources, the cost of providing wildlife benefits (including the cost of additional facilities to be installed or lands to be acquired specifically for that particular phase of wildlife conservation relating to the development and improvement of wildlife), the part of the cost of joint-use facilities allocated to wildlife, and the part of such costs, if any, to be reimbursed by non-Federal interests.

APPLICABILITY TO PROJECTS

(g) The provisions of this section shall be applicable with respect to any project for the control or use of water as prescribed herein, or any unit of such project authorized before or after the date of enactment of the Fish and Wildlife Coordination Act for planning or construction, but shall not be applicable to any project or unit thereof authorized before the date of enactment of the Fish and Wildlife Coordination Act if the construction of the particular project or unit thereof has been

substantially completed. A project or unit thereof shall be considered to be substantially completed when sixty percent or more of the estimated construction cost has been obligated for expenditure.

EXEMPT PROJECTS AND ACTIVITIES

(h) The provisions of sections 661–666c of this title shall not be applicable to those projects for the impoundment of water where the maximum surface area of such impoundments is less than ten acres, nor to activities for or in connection with programs primarily for land management and use carried out by Federal agencies with respect to Federal lands under their jurisdiction.

U.S. GOVERNMENT PRINTING OFFICE: 1974